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Application No.2497 of 2023 in Arb O.P.(Com.Div.) No.190 of 2023 etc

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.09.2023

Pronounced on : 04.10.2023

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

**Application No.2497 of 2023
in
Arb O.P.(Com.Div.)Nos.190 and 433 of 2023**

M/s.Evolve Business Ventures
A Proprietary concern -
Rep. by its Proprietor Mrs.Mamtalunked
No.18/1, S.Kariappa Road,
Model House Cross Road,
Basavanagudi, Bangalore - 560 004. .. Applicant

vs.

The Airport Director,
The Airport Authority of India,
Chennai Airport,
Chennai - 16. .. Respondent

Prayer : - Application under Section 34(4) of the Arbitration and Conciliation Act, 1996, has been filed seeking to remand the matter to the arbitral tribunal to enable it to eliminate the grounds of challenge to the impugned award dated 16.02.2023 as modified by order dated 26.03.2023 insofar as findings given by the arbitral tribunal on issue Nos.7,8,14,16&17 and the awarding of costs of arbitral proceeding.



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For applicant : Mr.V.P.Raman
For respondent : Mr.R.Sankaranarayanan
Senior Counsel,
for M/s.Pranav Shankar &
Mr.Ramaswamy Meyyappan

ORDER

Application No.2497 of 2023 has been filed under Section 34(4) of the Arbitration and Conciliation Act, 1996 (in short 'the Act') by the petitioner in Arb.O.P.(Com.Div.)No.190 of 2023. The applicant seeks to remand the matter back to the arbitral tribunal for the purpose of eliminating the grounds of challenge to the impugned arbitral award dated 16.02.2023 modified by order dated 26.03.2023.

2. In support of this application, the applicant has contended as follows:-

a) The arbitral tribunal, while holding that the invocation of the bank guarantee and cash deposit to be valid, premised the finding on the reasoning that the applicant had failed to make payment to the respondent. According to the applicant, in the table of calculations, the arbitral tribunal made certain arithmetical errors, for which, the applicant filed an application under Section 33 of the Act to correct the



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arithmetic errors. According to the applicant, the application under

Section 33 of the Act was allowed by the arbitral tribunal by its order dated 26.03.2023 and the arbitral tribunal corrected the errors and it was found that it was the respondent who has to pay a sum of Rs.2,92,06,576/- to the applicant. Therefore, according to the applicant, the basis for upholding the invocation of bank guarantee and cash deposit i.e., the applicant owed money to the respondent, does not exist in the award post the modification.

(b) The arbitral tribunal upheld the termination, since the applicant defaulted in paying the concession fee within 90 days period and owed a sum of Rs.32 crores. However, according to the applicant, as per the order dated 26.03.2023 passed under Section 33 of the Act, there is no due on the part of the applicant and in fact, it is only the respondent who is liable to pay the applicant a sum of Rs.2,92,06,576/- together with *pendente lite* interest at 9%. According to the applicant, the basis of upholding the termination has also vanished post the modification of the award. It is also the case of the applicant that non payment within 90 days as an event of default was neither an issue nor were any arguments advanced before the arbitral tribunal.



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(c) The errors pointed out by the applicant are curable defects.

According to the applicant, the Tribunal has already given findings on all issues, whereas the reasoning for certain findings has been obliterated on account of arithmetic errors, which were corrected by the arbitral tribunal by order dated 26.03.2023 passed under Section 33 of the Act. Therefore, according to the applicant, issues dealing with the validity of invocation of bank guarantee, the validity of termination, the findings as available in the arbitral award, are to be revisited in light of arithmetic errors, that were corrected and thereby concluded that it is only the respondent who owes money to the applicant and not vice versa.

3. Mr.V.P.Raman, the learned counsel for the applicant, reiterated the contents of the affidavit filed in support of this application during the course of his submissions.

4. On the other hand, it is the contention of the respondent that the instant application is not maintainable for the following reasons:-

(a) Both the parties have challenged the arbitral award under Section 34(1) of the Act, pleading grounds under Section 34(2)(b)(ii) of



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the Act. The applicant has preferred Arb O.P.(Com.Div.) No.190 of 2023 and the respondent has preferred Arb O.P.(Com.Div.) No.433 of 2023.

(b) Arb.O.P.(Com.Div.) No.190 of 2023 pleads exhaustively that the award offends public policy and that it suffers from patent illegality. Arb.O.P.(Com.Div.) No.190 of 2023 seeks setting aside the specific issues, whereas Arb.O.P.(Com.Div.) No.433 of 2023 seeks setting aside of the impugned arbitral award in its entirety. Evidently, both the parties are dissatisfied with the arbitral award.

(c) The instant application filed under Section 34(4) of the Act for remand is impermissible in law in the light of the decision of the Hon'ble Supreme Court in ***Dyna Technologies (P) Ltd. Vs. Crompton Greaves Limited, reported in [2019 (20) SCC 1]***, wherein it has been held that the award suffering from perversity or inherent lack of reasoning cannot be remanded back to the arbitral tribunal under Section 34(4) of the Act and that remand ought to be only in respect of curable defects.

(d) In the decision rendered by the Hon'ble Supreme Court in ***I-Pay Clearing Services (P) Ltd. Vs. ICICI Bank Limited, reported in [2022 (3) SCC 121]***, it has been made clear that if on a prima-facie consideration, it appears that there is a patent illegality in the award itself



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by not recording a finding on a contentious issue, in such cases, the Court may not accede to the request of a party for giving an opportunity to the arbitral award to resume the arbitral proceedings.

(e) It is also the case of the respondent that specifically on merits, the award suffers from patent illegality and perversity. Further, it is the case of the respondent that in terms of the decision of the Hon'ble Supreme Court in the case of *NHAI Vs. M.Hakeem and another, reported in [2021 (9) SCC 1]*, under Section 34 of the Act, there is no power to modify, revise or vary the award, and that the limited remedy under Section 34 is to set aside an award and remand the matter only under the circumstances mentioned in Section 34(4) of the Act to eliminate the grounds of challenge to the arbitral award. According to the respondent, issue No.2 considered by the arbitral tribunal is critical and that it has a bearing on the assessment of who has caused the delay and whether license fee could be collected from 22.11.2018 to 14.04.2019 is a fact finding of the arbitral tribunal. The arbitral tribunal has further held that the determination of issue No.2 has a bearing on issue Nos.4 and 15 i.e., in relation to escalation of rent and the date on which the escalation could be applied. Hence, issue Nos.2, 4 and 15



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cannot be severed as they go together.

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(f) Issue No.1 deals with whether the termination notice dated 13.03.2021 is valid; issue No.3 deals with whether the claimant is entitled to Covid-19 relief under Commercial Circular Nos.24 and 26; issue No.7 is in relation to encashment of security deposit and replenishment thereof; issue No.8 is in relation to invocation of bank guarantee and its replenishment; issue No.9 is in relation to dues payable by the claimant to the respondent; issue No.10 is in relation to penal interest liability; and issue Nos.13 and 14 are in relation to validity of termination notices issued by the respondent. All have a foundational bearing in determination of issue Nos.2, 4 and 15. In other words, issue Nos.1,3,7,8,9,10,13&14 are inseparable and are to be taken together and read in conjunction with issue Nos.2, 4 and 15. If the findings in relation to issue No.2 are found to be offending Section 34 of the Act, it has a cascading effect on the findings in relation to all other issues. These issues cannot be severed and are to be taken together.

(g) The applicant has sought for setting aside the findings of the arbitral tribunal in relation to issue Nos.5,6,7,8,14,16&17. So, according to the respondent, this cannot be done in a piecemeal manner, since the



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applicant themselves have assailed the above issues as being hit by the grounds under Section 34(2)(b) of the Act. Therefore, remission would become impermissible and more specifically, remand of only limited issues selectively cherry picked by the applicant cannot be granted.

5. Mr.R.Sankaranarayanan, the learned Senior counsel for the respondent, reiterated the above said contentions of the respondent in his submissions.

DISCUSSION:

6. It is an admitted fact that both the applicant and the respondent have challenged the very same impugned arbitral award and both of them have raised the ground of perversity and patent illegality.

7. A harmonious reading of Sections 31, 34(1), 34(2-A) and 34(4) of the Act makes it clear that in appropriate cases, on the request made by a party, the Court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award.



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But, at the same time, when it prima-facie appears that there is a patent

illegality in the award itself, by not recording a finding on a contentious

issue, in such cases, the Court may not accede to the request of a party

for giving an opportunity to resume the arbitral proceedings under

Section 34 of the Act. The above mentioned ratio was laid down by the

Hon'ble Supreme Court in its decision rendered in the case of ***I-Pay***

Clearing Services (P) Ltd. (cited supra). The Hon'ble Supreme Court

held in the above said decision that Section 34(4) of the Act can be

resorted to record reasons on the finding already given in the award or to

fill up gaps in the reasoning of the award and not where there is no

finding at all. To enunciate the difference between the words 'finding'

and 'reasons', the Hon'ble Supreme Court by relying on a decision in the

case of Income Tax Officer, A Ward, Sitapur Vs. Murlidhar Bhagwan

Das , reported in *AIR 1965 SC 342*; and in J.Ashoka Vs. University of

Agricultural Sciences and others, reported in *(2017) 2 SCC 609* , held that

the reasons are the links between the materials on which certain

conclusions are based and the actual conclusions. The Hon'ble Supreme

Court, accordingly, held in ***I-Pay Clearing Services(cited supra)*** that in

the absence of any finding by the arbitrator, it cannot be said that it is a



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fit case where additional reasons are required to be given or that there are gaps in reasoning. Further, the Hon'ble Supreme Court distinguished the judgment passed by it in the case of Dyna Technologies Private Limited Vs. Crompton Greaves Ltd [2019 SCC Online SC 1656]; Som Datt Builders Limited Vs. State of Kerala [2009 (10) SCC 259]; and Kinnari Mullick and another Vs. Ghanshyam Das Damani [2018 (11) SCC 328], and observed that the words "where it is appropriate" in Section 34(4) of the Act indicate that the Court has discretionary powers to remit a matter when requested by a party. The Hon'ble Supreme Court held that merely because an application is filed under Section 34(4) of the Act, it is not always obligatory on the part of the Court to remit the matter to the arbitral tribunal. The Hon'ble Supreme Court held that the discretionary power conferred under Section 34(4) of the Act is to be exercised where there is inadequate reasoning or to fill gaps in the reasoning, in support of the findings that were already recorded in the award. The application filed under Section 34(4) of the Act is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act. Under the guise of additional reasons and filling the gaps in reasoning, no award can be remitted to the arbitrator or the power conferred on the



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Court cannot be relegated to the arbitrator, where there are no findings on the contentious issues in the award. If there are no findings on the contentious issues in the award or if findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself. In the absence of any finding on a contentious issue, no amount of reasons can cure the defect in the award.

8. In the case on hand, as observed earlier, both the parties have challenged the impugned arbitral award on the ground of perversity and patent illegality. The respondent has also raised several grounds in Arb.O.P.(Com.Div.) No.433 of 2023 to establish their case that the entire impugned arbitral award suffers from perversity and patent illegality. The petitioner has also raised grounds in Arb.O.P(Com.Div)No.190 of 2023 and as seen from the said grounds, the petitioner has also challenged the impugned arbitral award on the ground that the award is perverse and patently illegal.

9. In this application filed under Section 34(4) of the Act, the



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applicant has sought for setting aside the findings in relation to issue Nos.5,6,7,8,14,16&17. But, however, as seen from the impugned arbitral award, on a prima-facie consideration, issue Nos.1,3,7,8,9,10,13&14 are inseparable and are to be taken together and read in conjunction with issue Nos.2,4&15. According to the respondent, the finding of the arbitral tribunal in relation to issue No.2 is patently illegal and it has a cascading effect on the findings in relations to all other issues.

10. The issues framed by the arbitral tribunal under the impugned award are as follows:-

1. Whether the claim petition seeking for quashment of termination notice dated 13.03.2021 legally competent and damages not adequate relief?

2. Whether the claimant is entitled to a waiver of Rs.16,20,57,838/- for the period from 22.11.2018 to 14.04.2019 by directing the rent commencement date to be deferred to 15.04.2019, as contended by the claimant?

3. Whether the claimant is entitled to the benefit of Commercial Circular No.24 of 2020, dated 14.08.2020, Commercial Circular No.26 of 2020, dated 09.12.2020 and Commercial Circular No.40 of 2021, dated 05.08.2021 and if so, to what amounts?



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4. *Whether the claimant is entitled to a rebate on the annual escalation fee to an amount of Rs.1,45,06,309/- towards the annual escalation fee computed wrongly from November 2019 to November 2020 and a further sum of Rs.1,22,46,023/- to the claimant charged towards annual escalation computed wrongly from November 2020 to February 2021 and if not, to what amount?*

5. *Whether the respondent is guilty of not handling over space of 63 sq.mtrs. from 15.04.2019 to 31.03.2021 and for charging in full for 54 sq.mtrs., which were provided in a staggered manner in FY 2019-2020 and FY 2020-2021 and hence, the claimant is entitled rebate of Rs.5,86,10,207/- and if not, to what amount?*

6. *Whether the respondent is guilty of not handing over space of 24 sq.mtrs. in arrival terminal as per clause 5.4.6 of MCA and hence liable to Rs.26,08,22,333/- by way of rebate to the claimant and if not to what amount?*

7. *Whether the respondent is justified in encashing the security deposit of Rs.5,71,78,980/- and seek for its replenishment?*

8. *Whether the respondent is justified in invoking bank guarantee for alleged default in*



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payment of the license fee as per MCA and entitled to seek for replenishment of the bank guarantee amount to the tune of Rs.20,25,92,102/-?

9. Whether there are any outstanding dues by the claimant to the respondent up to 06.07.2021 to a sum of Rs.56,45,82,015.31 and if not, to what other amount?

10. Whether the claimant is liable for interest as well as penal interest for alleged outstanding dues and for alleged delayed payments?

11. Whether the claimant is guilty of having reconstituted and transferred the identity from a proprietary concern to any other form of legal entity and bound to retransfer, if already effected?

12. Whether the claimant and the respondent are entitled to interest one against the other?

13. Whether the termination letter bearing No.AAMC.0156/2019/Vol.IV-137, dated 15.02.2022 is illegal and otherwise untenable?

14. Whether the termination letter bearing No.AAM/C.OI 56/2019 Vol.IV-148, dated 15.02.2022 terminating the Master Concession Agreement is illegal and otherwise untenable?

15. Whether the claimant is entitled to a rebate to an amount of Rs.1,20,46,023/- to the claimant charged towards annual escalation



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computed wrongly from November 2020 to February 2021?

16. Whether the claimant can be reinstated as the concessionaire under the Master Concessionaire Agreement?

17. In the alternative, whether the claimant is entitled to damages [present losses incurred + future profits] to a tune of Rs.28,07,84,605/- for wrongful termination?"

11. As seen from the aforesaid issues framed by the arbitral tribunal, the issues cannot be severed and have to be decided together. The findings with regard to the issues cannot be given in a piecemeal manner. The applicant themselves have assailed the findings rendered by the arbitral tribunal with regard to issue Nos.5,6,7,8,14,16&17 as being perverse, opposed to public policy and patently illegal. The applicant selectively seeking for setting aside the findings of the arbitral tribunal under the impugned arbitral award in relation to issue Nos. 5,6,7,8,14,16&17 alone is not legally permissible under the provisions of Section 34(4) of the Act. The respondent has challenged the impugned arbitral award in entirety by questioning the findings of the arbitral tribunal, as according to them, it is opposed to public policy and patently



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illegal.

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12. This Court is of the considered view, as laid down by the Hon'ble Supreme Court in *I-Pay Clearing Services (cited supra)*, the applicant themselves having assailed issue Nos. 5,6,7,8,14,16&17 as being patently illegal as per Section 34(2)(b) of the Act, remand under Section 34(4) of the Act is impermissible and more specifically, remand of only limited issues selectively cherry picked by the applicant cannot be acceded to by this Court. In the event of this Court, while deciding the main application under Section 34 of the Act, finds that the finding given by the arbitral tribunal with regard to issue No.2 is patently illegal, it will have a cascading effect on the findings in relation to other issues. Therefore, the issues that arise for consideration with regard to arbitral claim made by the applicant before the arbitrator cannot be severed and they are to be taken together.

13. As seen from Section 34(4) of the Act, the remission is limited



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to an opportunity being afforded to the arbitral tribunal to get rid of the defects which are manifest and can be remedied without the foundation of the award or the various findings and conclusions recorded therein being impacted. The remit to the arbitral tribunal in terms of the said provision cannot be read as conferral of authority on the arbitral tribunal to reconsider or modify the finding, which may entail what in legal terms is alluded to as a "merit review". Section 34(4) is curative in nature and recourse to the same can only be taken for correcting the curable defects such as filling gaps in reasoning and correcting typographical and arithmetical errors, and not to allow the arbitral tribunal to do a review of the award. However, if the award suffers from any of the illegalities which are spelt out in Section 34(2)(a) or (b), it must suffer the fate of being set aside and cannot be saved with the aid of Section 34(4) of the Act. Therefore, it is clear that while deciding an application under Section 34(4) of the Act, this Court cannot have a relook at the award. The modification of the award by the Court under Section 34 of the Act is prohibited by the Supreme court in ***M.Hakeem case (cited supra)*** and the said decision would equally apply to the modification of the award by the tribunal.



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WEB COPY 14. For the foregoing reasons, this Court does not find any merit in this application. Accordingly, Application No.2497 of 2023 stands dismissed. No Costs. Post Arb.O.P.(Com.Div.)Nos.190 and 433 of 2023 for final arguments on 01.11.2023.

04.10.2023

Index: Yes/ No
Speaking order / Non speaking order
Neutral citation : Yes / No
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ABDUL QUDDHOSE, J.

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